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No. 79-848

# In the Supreme Court of the United States

OCTOBER TERM, 1979

ROBERT DONOFRIO, ET AL., PETITIONERS

*v.*

RAY MARSHALL, SECRETARY OF LABOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is reported at 605 F. 2d 1196 (table). The opinion of the district court (Pet. App. A3-A12) is reported at 465 F. Supp. 838.

## JURISDICTION

The judgment of the court of appeals (Pet. App. A2) was entered on September 6, 1979. The petition for a writ of certiorari was filed on December 3, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that the provisions of the Federal Mine Safety and

Health Act of 1977, 30 U.S.C. (and Supp. I) 801 *et seq.* (Mine Act), apply where the only persons working in a mine are three partners who own and operate it.[1]

2. Whether the court of appeals correctly concluded that provisions in the Mine Act authorizing warrantless safety and health inspections of mines are constitutional.

## STATEMENT

On May 12, 1978, an authorized representative of the Secretary of Labor went to D. D. & R. Coal Company's Diamond Slope coal mine in Schuylkill County, Pennsylvania, to conduct a routine inspection pursuant to 30 U.S.C. (Supp. I) 813(a).[2] The inspector was admitted

[1]The Federal Coal Mine Health and Safety Act of 1969 was amended, effective March 9, 1978, and renamed the Federal Mine Safety and Health Act of 1977. See Federal Mine Safety and Health Amendments Act of 1977, Pub. L. No. 95-164, 91 Stat. 1290.

[2]30 U.S.C. (Supp. I) 813(a) reads as follows:

> Authorized representatives of the Secretary [of Labor] or the Secretary of Health, Education, and Welfare shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under this title or other requirements of this Act. In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person, except that in carrying out the requirements of clauses (1) and (2) of this subsection, the Secretary of Health, Education, and Welfare may give advance notice of inspections. In carrying out the requirements of clauses (3) and (4) of this subsection, the Secretary shall make inspections of each underground coal or other mine in its entirety at least four times a year, and of each surface coal or other mine in its entirety at least two times a year. The Secretary shall develop guidelines for additional inspections of mines based on criteria including, but not limited to, the hazards found in mines subject to this Act, and his experience under this Act and other health and safety laws. For the purpose of making any inspection or investigation under this Act, the Secretary, or the Secretary of Health, Education, and Welfare, with respect to fulfilling his responsibilities under this Act, or any authorized representative of the Secretary or the Secretary of Health, Education, and Welfare, shall have a right of entry to, upon, or through any coal or other mine.



to the mine and found several violations of the Mine Act. He then issued citations for the violations and gave D. D. & R. Coal until June 12, 1978, to abate them (Pet. App. A4; A. 5a).[3]

When the inspector returned to the mine on June 13, 1978, petitioners refused to admit him, asserting that he needed a search warrant. The inspector then issued a citation (Pet. App. A4) and set June 14 at 9:00 a.m. as the deadline for abating the denial of entry violation (A. 11a). On June 15, the inspector returned and again was denied entry to the mine. He then issued five "withdrawal orders," pursuant to 30 U.S.C. (Supp. I) 814(b),[4] in connection with certain of the violations cited previously and extended the time within which D. D. & R. Coal was to abate other violations (*ibid.*).

[3]"A." refers to the appendix in the court of appeals.

[4]30 U.S.C. (Supp. I) 814(b) reads as follows:

> If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by

The Secretary of Labor then brought this action in the United States District Court for the Eastern District of Pennsylvania to enjoin petitioners, who own and operate D. D. & R. Coal, from refusing to allow duly authorized inspections. The district court entered summary judgment in the Secretary's favor (Pet. App. A13). The court held that the Mine Act covers mines such as D. D. & R. Coal in which the owners are the only miners (*id.* at A5-A7). The court also held that warrantless inspections under the Act "do not run afoul of the rationale of *Marshall* v. *Barlow's*, [436 U.S. 307 (1978),] or the restraints of the Fourth Amendment" (*id.* at A12).[5] The court of appeals affirmed per curiam (Pet. App. A1-A2).

## ARGUMENT

In affirming the grant of injunctive relief against petitioners, the court of appeals relied exclusively on its recent opinions in *Marshall* v. *Kraynak*, 604 F. 2d 231 (3d Cir. 1979), cert. denied, No. 79-586 (Jan. 7, 1980), and *Marshall* v. *Stoudt's Ferry Preparation Co.*, 602 F. 2d 589 (3d Cir. 1979), cert. denied, No. 79-614 (Jan. 7, 1980). In *Kraynak*, the court of appeals held that Congress intended the Mine Act to cover mines in which

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the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

[5]The district court erroneously referred to warrantless inspections conducted "under Section 201(a)" of the Mine Act (Pet. App. A12; see also *id.* at A7). As shown by the court's reference to the coordinate United States Code section, 30 U.S.C. 813(a), the inspections were carried out pursuant to Section 103(a) of the Act. The fact that Section 103(a) was amended by Section 201 of the Federal Mine Safety and Health Amendments Act of 1977 (see note 1, *supra*) probably accounts for the error.



the owners are the only miners. In *Stoudt's Ferry*, the court of appeals held that the Mine Act provisions authorizing warrantless health and safety inspections of mines do not violate the Fourth Amendment.[6] The Secretary's briefs in opposition in *Kraynak* and *Stoudt's Ferry* explain that each of these decisions is correct and does not conflict with any decision of this Court or another circuit.[7]

In denying certiorari in *Kraynak* and *Stoudt's Ferry*, the Court recently declined to review issues identical to those now raised by petitioners. There is no greater reason to grant review here.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6]The Fourth Circuit recently reached the same conclusion in *Marshall* v. *Sink*, No. 77-2614 (Jan. 24, 1980).

[7]We are providing petitioners with copies of the Secretary's briefs in opposition in *Kraynak* and *Stoudt's Ferry*.

DOJ-1980-01